No. 14457.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TAKESHI TAMADA,

Appellant,

vs.

JOHN FOSTER DULLES,

Appellee.

On Appeal From the United States District Court, Southern District of California, Central Division.

BRIEF FOR APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,
MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division,
ANDREW J. DAVIS,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Jurisdiction.

The District Court has jurisdiction of the action under provisions of Section 503 of the Nationality Act of 1940 (8 U. S. C. 903) as alleged in Paragraph III of plaintiff's Complaint [R. 3], the necessary factual allegations of "denial of a right or privilege as a national of the United States * * * on the ground that he is not a national * * *" as required by Section 903 being alleged in Paragraphs V and VI of plaintiff's Complaint [R. 4]. The denial having been made by the Secretary of State, the defendant, as head of that Department, is the necessary and proper defendant as required by said Section 903, *supra.*

This Court has jurisdiction of this appeal under the provisions of 28 U. S. C. 1291 and 1294(1), there being no dispute that the judgment of the District Court was a final judgment.

Statutes Involved.

The denial of citizenship by defendant-appellee was based on the provisions of Sections 401(c), 401(e) and 402 of the Nationality Act of 1940 (8 U. S. C. 801(c), 801(e) and 802) as follows:

> "§801. General means of losing United States Nationality.
>
> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> (c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or
>
> (e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; . . .
>
> §802. Presumption of expatriation.
>
> A national of the United States who was born in the United States * * * shall be presumed to have expatriated himself under subsection (c) or (d) of Section 801, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state * * * and such presumption shall exist until overcome whether or not the individual has returned to the United States. Such presumption may be overcome on the presentation of satisfactory evidence to a

diplomatic or consular officer of the United States or to an immigration officer of the United States under such rules and regulations as the Department of State and the Department of Justice jointly prescribe. * * *"

Section 503 of the Nationality Act of 1940 (8 U. S. C. 903) is set forth in part as follows:

"If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. * * *"

Statement of the Case.

Appellant was born in Hawaii on September 5, 1924 [R. 22] and thus had dual nationality of the United States and Japan by birth [R. 12]. His parents, two brothers and two sisters travelled to Japan in 1933 when the appellant was eight years old [R. 23]. Appellant remained in Japan except for a period of army service in Korea and China until August 3, 1953, when he was admitted to the United States on a Certificate of Identity to prosecute this action.

In October, 1941, appellant became employed at the Naval Arsenal, Hiroshima, Japan, making airplane parts and continued working there until December, 1944 [R.

13, 39-40]. Appellant then entered the Japanese Army where he served until 1946 [R. 32-33]. While in the army, appellant was trained for and became, a member of the Kempetai [R. 44]. The Kempetai was an organization within the Japanese army which was the military or secret police. It was considered a high honor for a soldier to obtain membership in such an elite segment of the army [R. 41, 44-47]. After the war, appellant voted in political elections in Japan of 1946, 1947 and 1948 [R. 33].

In 1949, appellant applied at the American Consulate in Japan for a passport to return to the United States [R. 35]. The passport application was denied and a "Certificate of the Loss of the Nationality of the United States" was issued appellant which recited that he had expatriated himself by serving in the Japanese army as a Japanese national.

The Complaint in the action was filed by appellant on October 18, 1949, praying for a declaration of United States nationality [R. 3-6]. Trial was had on March 19, 1954, with judgment being rendered for appellee and against appellant [R. 11]. Findings of Fact and Conclusions of Law were signed and filed by the District Court on April 19, 1954 [R. 11-17]. Judgment was docketed and entered also on April 19, 1954, and Notice of Appeal filed June 18, 1954 [R. 17-19].

During the trial, only the plaintiff testified as is the usual situation in cases of this type. He testified in general that he had been drafted into the Japanese army pursuant to the conscription law and that he had not protested on the ground that he was an American citizen because he was afraid. Appellant further testified that he had only voted because he was afraid of losing his rations

and because it was an order to vote from General McArthur's headquarters. He therefore claimed that both his army service and voting had been involuntary.

On cross-examination the appellant admitted making several prior statements which were in conflict with his testimony at the trial [R. 52-65]. The statements contained in Exhibit D which were admittedly written by appellant show a loyalty to Japan and a desire to aid Japan's war effort [R. 59, 60].

The Findings of Fact filed by the Court recite that the appellant's army service and voting were his free and voluntary acts [R. 14, 15.] The Findings also recite that appellant did not protest either his entry into the Japanese army or the Kempetai and that appellant made misstatements under oath [R. 13, 14].

Questions Presented.

1. Which party has the burden of proof, appellant or appellee, and the quantum of proof necessary for that party to prevail.
2. Whether the finding that appellant's military service was voluntary was clearly erroneous.
3. Whether this Court should decide the voting issue or remand the case as was done in *Perri v. Dulles* (C. A. 3, 1953), 206 F. 2d 586, in the event it is determined that the finding that appellant's military service was voluntary was clearly erroneous.
4. If the Court feels it should decide the voting issue, whether the finding that such voting was voluntary was clearly erroneous.
5. Whether Exhibits "A", "C", and "D" were properly admitted in evidence.

ARGUMENT.

Summary of Argument.

A. UNDER SECTION 503 OF THE NATIONALITY ACT OF 1940 (8 U. S. C. A., SEC. 903), THE BURDEN OF PROOF IS UPON PLAINTIFF.

1. No presumption of involuntariness arises merely because of conscription into army.

2. Plaintiff must establish by preponderance of evidence that the expatriating act was not voluntary.

B. THE FINDING OF THE TRIAL COURT THAT APPELLANT'S ARMY SERVICE WAS VOLUNTARY IS SUPPORTED BY THE EVIDENCE.

C. THE VOTING ISSUE HAS PRACTICALLY BECOME MOOT DUE TO THE ENACTMENT OF THE "WATKINS ACT", PUBLIC LAW 515, 83rd CONGRESS.

1. If this Court rules upon the voting issue notwithstanding the Watkins Act, the finding of the trial court that the voting was voluntary is supported by the evidence.

D. EXHIBITS "A", "C" and "D" WERE PROPERLY ADMITTED INTO EVIDENCE.

A. Under Section 503 of the Nationality Act of 1940 (8 U. S. C. A., Sec. 903), the Burden of Proof Is Upon Plaintiff.

Appellant filed his action alleging that he had been born in Hawaii and had later travelled to Japan, served in the Japanese army and voted in Japanese elections. It was also alleged that his military service and voting had not been his free and voluntary acts [R. 4, 5]. The answer filed by appellee admitted that appellant had served in the Japanese army and had voted in 1946 and affirmatively alleged that appellant had also voted in 1947 and 1948 [R. 7]. The answer denied appellant's allegations that his military service and voting had not been voluntary [R. 8]. There was no direct finding by the trial court that appellant had been conscripted although finding "X" recites that "Plaintiff did not protest his induction into the army and did not protest his service in the Kempetai . . ." [R. 13, 14].

Under Section 503 of the Nationality Act of 1940, the burden of proof is upon the plaintiff in general. (*Shew v. Dulles* (C. A. 9, 1954), 217 F. 2d 146; *Pandolfo v. Acheson* (C. A. 2, 1953), 202 F. 2d 38; *McGrath v. Tadayasu Abo* (C. A. 9, 1951), 186 F. 2d 766.)

1. No Presumption of Involuntariness Arises Merely Because of Conscription Into Army.

Appellant contends that a presumption of involuntary service arises where one enters the armed forces of a nation pursuant to a conscription law. Appellee submits there is a presumption of voluntary service under the statute which must be overcome by a plaintiff in an action under Section 503 of the Nationality Act. The case of *Pandolfo v. Acheson* (C. A. 2, 1953), 202 F. 2d 38,

states that the burden is first upon the plaintiff to establish his birth in the United States. The burden of going forward is then shifted to the government to show an expatriating act and finally, the burden of showing, by the preponderance of evidence, that such act was involuntary, is upon the plaintiff. Therefore, in a case such as at bar, where the complaint alleged military service and further, that such service was involuntary, it would seem to be clear that the burden is upon plaintiff to establish such fact. (*In re Gogal* (1947), 75 Fed. Supp. 268; *cf. Lehmann v. Acheson* (C. A. 3, 1953), 206 F. 2d 592.)

In the case of *Hamamoto v. Acheson* (1951), 98 Fed. Supp. 904, 905, Judge Byrne stated in reply to a contention by the plaintiff that service pursuant to a conscription law could not be voluntary as follows:

> "To accept that reasoning is to defeat the Congressional design to discourage dual nationality which is implicit in the statute. Can we believe that Congress intended the Act to be ineffective with relation to foreign states that followed a policy of conscription in the recruitment of their armies? Can we say that the hundreds of thousands of United States servicemen who were conscripted and served during the last war were involuntarily forced into the service under duress? On the contrary, when they answered the call to arms without resistance their action was voluntary and this included those who did not view the prospect of army life with relish as well as those imbued with the zeal of patriotism."

To similar effect see the case of *Toshio Kondo v. Acheson* (1951), 98 Fed. Supp. 884.

2. Plaintiff Must Establish by the Preponderance of Evidence That the Expatriating Act Was Not Voluntary.

The presumption contained in the statute (Sec. 503 of the Nationality Act, 8 U. S. C. A., Sec. 802, *supra*), would seem to clearly place the burden of proof upon the plaintiff since he resided in Japan approximately twenty years. The appellant's expatriating act involved military service and therefore is included within the language ". . . shall be presumed to have expatriated himself under subsection (c) or (d) of Section 801 . . ." It is submitted that the following cases cited above also place the burden of proof upon the plaintiff.

Pandolfo v. Acheson (C. A. 2, 1953), 202 F. 2d 38;

McGrath v. Abo (C. A. 9, 1951), 186 F. 2d 766;

Hamamoto v. Acheson (1951), 98 Fed. Supp. 904;

Kondo v. Acheson (1951), 98 Fed. Supp. 884;

In re Gogal (1947), 75 Fed. Supp. 268.

Section 402 of the Nationality Act of 1940 was discussed in the case of *Dos Reis v. Nicolls* (C. A. 1, 1947), 161 F. 2d 860, 868. In that case, it was stated at page 868:

> "* * * Section 402 creates only a rebuttable presumption, and it does not enlarge the content of §401(c). Furthermore, the language of §402—'shall be presumed to have expatriated himself under subsection (c) or (d) of section 401'— furnishes strong support for our interpretation of §401(c). To 'expatriate' oneself clearly implies voluntary action. 'Expatriation is the voluntary renunciation or abandonment of nationality and allegiance." Perkins v. Elg, 1939, 307 U. S. 325, 334, 59 S. Ct. 884, 889,

> 83 L. Ed. 1320. In this case Camara certainly overcame any presumption that he had voluntarily renounced or abandoned his American nationality and allegiance."

The above quoted language was cited with approval in *Kawakita v. United States* (1952), 343 U. S. 717, 730. The fact that the court in the *Dos Reis* case stated that "Camara certainly overcame any presumption" indicates that a presumption arose and that it was for the plaintiff, Camara, to overcome.

The case of *Lehmann v. Acheson* (C. A. 3, 1953), 206 F. 2d 592, relied upon by appellant does clearly state that the burden is upon the defendant to show that army service was voluntary. However, in a footnote to cite authority for their conclusion, reference is made to the interpretation placed upon Section 402 in *Kawakita, supra.* Since *Kawakita* apparently adopted the interpretation as contained in the *Dos Reis* case, *supra,* it is submitted that the rule should properly be that the burden of showing involuntariness is upon plaintiff-appellant.

B. The Finding of the Trial Court That Appellant's Army Service Was Voluntary Is Supported by the Evidence.

The appellant was the only person who testified at the trial as is usual in this type of case. He testified that he had involuntarily entered the Japanese army in 1944 pursuant to a conscription law. On cross-examination he admitted various misstatements to American officials on different occasions while he was in Japan [R. 52-65]. He also admitted that he had been a member of the Kempetai which was the military police organization which "was in charge of the affairs in Japan" [R. 41-44].

Exhibit "A" was admitted to be in the appellant's own hand and signed by him [R. 52]. He stated therein and

had written under oath that he had not voted in the elections in Japan in 1947, 1948 and 1949. On direct examination at the trial he admitted voting in 1946, 1947 and 1948 [R. 33].

Exhibit "D" was also admitted to be written and signed by the appellant [R. 57]. In this document appellant had stated that he voluntarily took an examination to enter the Kempetai and passed and that he had previously made false reports to the American Consul [R. 58]. This document, written by appellant, also contains the statement [R. 59]:

> "The reasons for my entry into the Kempetai was to render greater service to Japan's war effort and at the same time keep in line others who were carrying out their duties."

Exhibit "D" also contains a statement that appellant made a daily oath that " 'I will do my best for the Emperor and endeavor Japan to crush the United States.' I repeated this oath voluntarily and with pride" [R. 61].

The trial judge did not believe the testimony of the appellant. He was certainly justified in refusing to believe the testimony as the appellant admitted lying on previous occasions. The Findings of Fact recite that the appellant's army service had been voluntary [R. 14]. Even if appellant's testimony had been uncontradicted, the District Court was not required to accept it as true. (*Shew v. Dulles* (C. A. 9, 1954), 217 F. 2d 146, 147.) Since the appellant had made prior statements contradictory to his testimony at the trial, there existed strong ground to disbelieve him. The finding of voluntary army service was not erroneous at all, much less, "clearly erroneous," as required by Rule 52(a) of the Federal Rules of Civil Procedure to justify reversal.

C. The Voting Issue Has Practically Become Moot Due to the Enactment of the "Watkins Act," Public Law 515, 83rd Congress.

The appellant admits in his Opening Brief, page 19, that if the judgment of the District Court is affirmed on the army service issue, then the election issue need not be reached. If this court should reverse on the army service issue, however, we believe that the case should then be sent back to the District Court to permit appellant an opportunity to take an oath as provided in the Watkins Act. This is suggested on page 20 of Appellant's Opening Brief under "2". The Watkins Act is set forth as Appendix "C" in the opening brief of appellant.

1. If This Court Rules Upon the Voting Issue Notwithstanding the Watkins Act, the Finding of the Trial Court That the Voting Was Voluntary Is Supported by the Evidence.

It is submitted that this case is not within *Takehara v. Dulles* (C. A. 9, 1953), 205 F. 2d 560, because there apparently was no finding in that case that the voting had been voluntary. Here, the trial court specifically found that the voting had been voluntary [R. 15]. Since the credibility of the appellant was impeached at the trial, the court did not have to believe his statements that his voting had been involuntary. (*Shew v. Dulles, supra.*) The finding was not clearly erroneous.

D. Exhibits "A", "C", and "D" Were Properly Admitted in Evidence.

All of the above exhibits were statements executed and written by the appellant. As was explained above, many of the statements were contrary to his testimony at the trial. They could then be admitted either to impeach the witness or as prior admissions. As admissions, the exhibits would be substantive evidence introduced by the defendant. If they were used only to impeach, then if the witness admitted the prior inconsistent statement they would be hearsay. Judge Byrne had the rule in mind and explained it carefully to counsel during the trial [R. 66]. However, where there was a question raised later as to whether the statements had been voluntarily executed, they were admitted in evidence. When the question of duress in executing the statements was raised, the appellant, in effect, denied making the statements. When he denies making a prior inconsistent statement which was written, but admits that the statement was signed by him, it can be introduced to impeach credibility.

It is therefore submitted that the exhibits were admissible on two grounds: for impeachment and as admissions.

If we assume that the exhibits were not admissions and could only be introduced to impeach the appellant, then their introduction still was not reversible error. To be error at all the appellant would have to admit that he had previously made the inconsistent statement. In that event, the introduction of the document would only be cumulative

and would not be further proof of any fact. The appellant is not prejudiced and therefore it would not be reversible error.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court that appellant was expatriated by reason of entry and service in the army of Japan pursuant to the provisions of Section 401(c) of the Nationality Act of 1940 should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division,

ANDREW J. DAVIS,
Assistant U. S. Attorney,

Attorneys for Appellee.